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SACR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSE JUAREZ,

Petitioner,

Civil No. 13-0286 BEN (PCL)

PEOPLE OF THE STATE OF
CALIFORNIA,

Respondent.

**ORDER DISMISSING CASE
WITHOUT PREJUDICE AND WITH
LEAVE TO AMEND**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

FAILURE TO SATISFY FILING FEE REQUIREMENT

Petitioner has failed to either pay the \$5.00 filing fee or submit adequate proof of his inability to pay the fee. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis. *See Rule 3(a), 28 U.S.C. foll. § 2254.*

FAILURE TO NAME PROPER RESPONDENT

Review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. *See id.*

1 The warden is the typical respondent. However, “the rules following section 2254 do not
 2 specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the warden of the
 3 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal
 4 institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a
 5 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall
 6 be the state officer who has official custody of the petitioner (for example, the warden of the
 7 prison).’” *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

8 A long-standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]
 9 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The
 10 actual person who is [the] custodian [of the petitioner] must be the respondent.” *Ashley v.
 11 Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of
 12 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the
 13 body” if directed to do so by the Court. “Both the warden of a California prison and the Director
 14 of Corrections for California have the power to produce the prisoner.” *Ortiz-Sandoval*, 81 F.3d
 15 at 895.

16 Here, Petitioner has incorrectly named “People of the State of California,” as Respondent.
 17 In order for this Court to entertain the Petition filed in this action, Petitioner must name the
 18 warden in charge of the state correctional facility in which Petitioner is presently confined or the
 19 Director of the California Department of Corrections. *Brittingham v. United States*, 982 F.2d
 20 378, 379 (9th Cir. 1992) (per curiam).

21 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

22 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner
 23 has failed to allege that his state court conviction or sentence violates the Constitution of the
 24 United States.

25 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
 26 federal habeas corpus claims:

27 The Supreme Court, a Justice thereof, a circuit judge, or a district court shall
 28 entertain an application for a writ of habeas corpus in behalf of a person in

1 custody pursuant to the judgment of a State court only on the ground that he is in
 2 custody in violation of the Constitution or laws or treaties of the United States.

3 28 U.S.C. § 2254(a)(emphasis added); see *Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir. 1991);
 4 *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800 F.2d
 5 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim under
 6 § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of a State
 7 court,” and that he is in custody in “violation of the Constitution or laws or treaties of the United

8 States.” See 28 U.S.C. § 2254(a).

9 In his petition, Petitioner states in claim one, that he is “respectfully moving this
 10 Honorable Court for an order modifying the sentence imposed [in] the above referenced case,”
 11 and in claim two, “the issue has not been waived” and “the trial court erred in imposing the
 12 maximum fine.” (Pet. at 3-13, ECF No. 1.) In no way does Petitioner claim he is “in custody
 13 in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES

15 Further, habeas petitioners who wish to challenge either their state court conviction or the
 16 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.
 17 § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). Ordinarily, to satisfy the
 18 exhaustion requirement, a petitioner must “fairly present[]” his federal claim to the highest state
 19 court with jurisdiction to consider it, or . . . demonstrate[] that no state remedy remains
 20 available.” *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996) (citations omitted). Moreover,
 21 to properly exhaust state court remedies a petitioner must allege, in state court, how one or more
 22 of his or her federal rights have been violated. For example, “[i]f a habeas petitioner wishes to
 23 claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law
 24 guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but
 25 in state court.” See *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (emphasis added).

26 Nowhere on the Petition does Petitioner allege that he raised his claims in the California
 27 Supreme Court. If Petitioner has raised his claims in the California Supreme Court he must so
 28 specify.

1 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
 2 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
 3 of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation
 4 period shall run from the latest of:

5 (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

6 (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

7 (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

8 (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

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 10 28 U.S.C. § 2244(d)(1)(A)-(D) (2002).

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 12 The statute of limitations does not run while a properly filed state habeas corpus petition
 13 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).
 14 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
 15 when its delivery and acceptance [by the appropriate court officer for placement into the record]
 16 are in compliance with the applicable laws and rules governing filings.”). However, absent some
 17 other basis for tolling, the statute of limitations does run while a federal habeas petition is
 18 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

19
 20 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
 21 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
 22 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.
 23 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
 24 habeas relief because he has not alleged exhaustion of state court remedies.

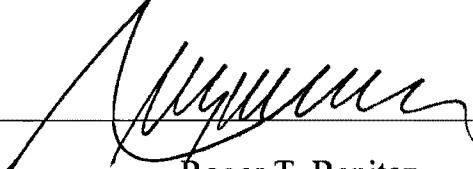
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CONCLUSION

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 27 For the foregoing reasons, the Court **DISMISSES** the Petition without prejudice and with
 28 leave to amend. To have this case reopened, Petitioner must, **no later than April 15, 2013**: (1)

1 pay the \$5.00 filing fee **OR** submit adequate proof of his inability to pay the fee, **AND** (2) file
2 a First Amended Petition that cures the pleading deficiencies outlined in this Order. ***The Clerk***
3 ***of Court is directed to mail Petitioner a blank Motion to Proceed In Forma Pauperis form and***
4 ***a blank First Amended Petition form to Petitioner along with a copy of this Order.***

5 **IT IS SO ORDERED.**

6 DATED: 2/10/2013

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8 Roger T. Benitez
9 United States District Judge

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